REMARKS

Claims 26-54 are currently pending in this application. Applicants respectfully traverse the outstanding rejections of Claims 26-54. In view of the remarks to follow, reconsideration and allowance of this application is respectfully submitted.

Applicants would like to thank Examiner Lopez for her time and consideration which was extended to Applicant's representative, Christopher Trainor, Esq., during the interview conducted at the USPTO on January 24, 2008. During the interview Applicant's representative and Examiner Lopez discussed the outstanding rejections. Applicants representative emphasized that none of the prior art references cited by the Examiner, taken alone or in combination, teach or suggest a tool assembly for use with a surgical stapler which includes the combination of a clamp member and dynamic clamping member as recited in independent Claims 26 and 48 of this application. Although no specific agreement was reached, Examiner Lopez agreed to consider Applicant's arguments upon submission of a written response.

In the Office Action mailed October 17, 2007, Claims 26, 34-36, 38, 45-48 and 51-53 were rejected under the judicially created doctrine of obviousness-type double patenting over Claims 26-32, 34 and 37-41 of copending application No. 10/529,799 ("'799 application") and Claims 42, 43, 49 and 50 were provisionally rejected over claims 26-32 and 37-41 of the '799 application in view of U.S. Patent No. 6,669,073 to Milliman ("Milliman"). Applicants have attached to this response a timely filed terminal disclaimer in compliance with 37 C.F.R. § 1.321(c). Thus, Applicants respectfully submit that these provisional rejections have been overcome.

In the Office Action, Claims 26, 27, 34-39, 42, 43 and 45-54 were rejected under 35 U.S.C. § 103(a) over U.S. Patent No. 5,485,952 to Fontayne ("Fontayne") in view of Milliman. Fontayne discloses a surgical stapling apparatus 10, shown in FIGS. 4 and 8 reproduced below, comprising, *inter alia*, a cartridge housing 16, an anvil member 18, and a collar tube 90. Collar tube 90 functions to move anvil member 18 to a closed position. An actuator rod 286 is also movable to drive pusher elements upwardly to urge staples 302 from a cartridge element 300.

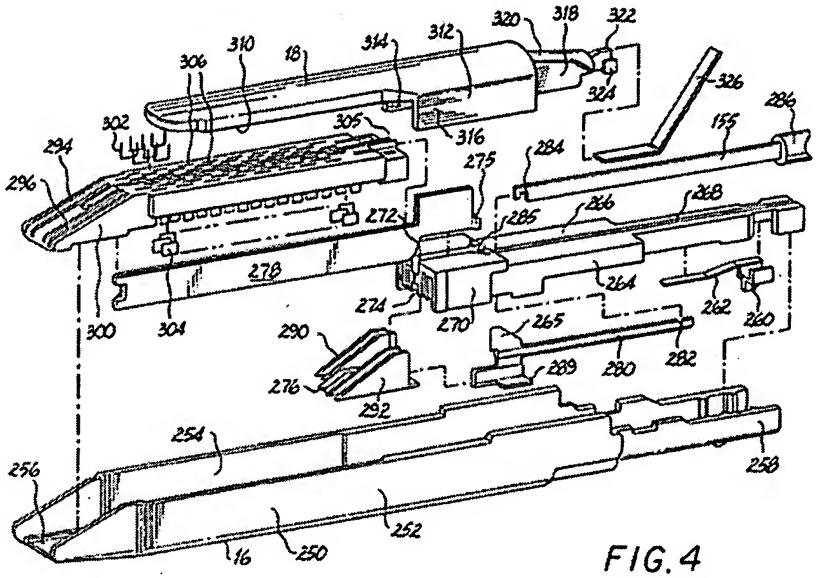
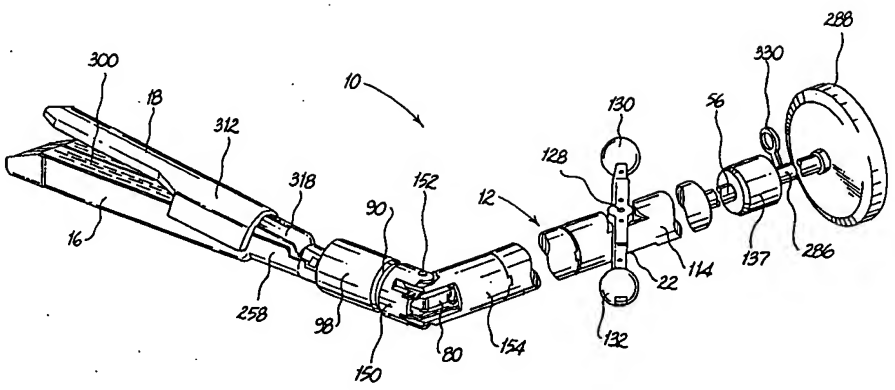


FIG. 4

FIG. 8



Milliman discloses a surgical stapling apparatus shown in FIGS. 1, 24 and 29 reproduced below which includes a tool assembly including an anvil assembly 20 and a cartridge assembly 18. A camming surface 209 is formed on a proximal end of anvil portion 204 of anvil assembly 20. The assembly includes a drive assembly 212 having a working head 268 which has a cam roller 286 (FIG. 29) which is movable axially to pivot anvil assembly 20 in relation to cartridge assembly 18 from an open position to a closed position. Working head 268 also includes a support member 287 which moves along cartridge assembly 18. Cam roller 286 and support member 287 engage anvil assembly 20 and cartridge assembly 18, respectively, to define the maximum tissue gap adjacent the location where stapling formation occurs. Thus, drive assembly 212 functions to both move the anvil assembly 20 to a closed position and to define a maximum tissue gap.

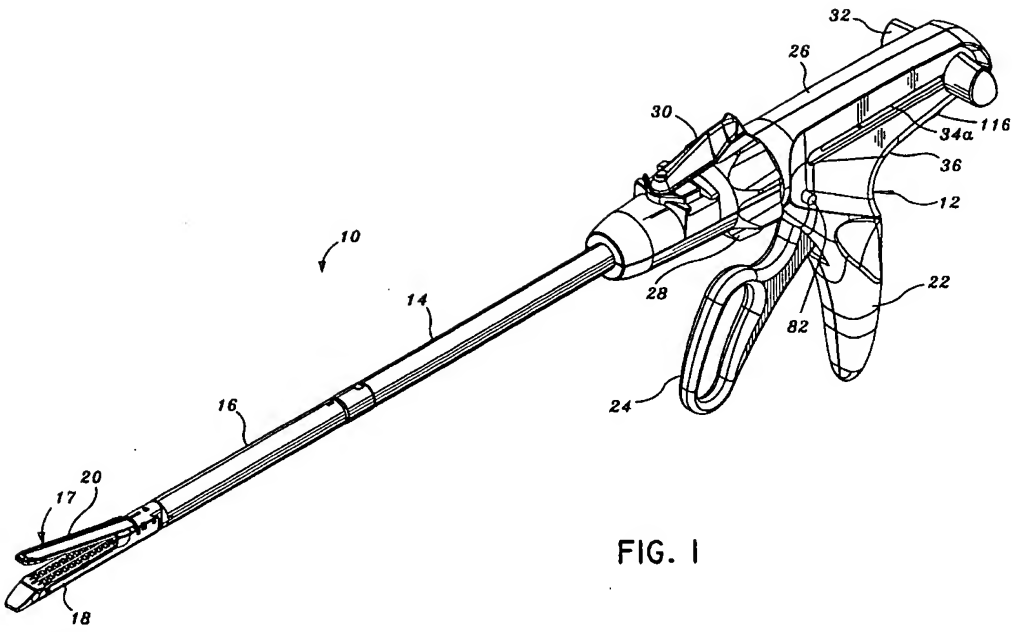

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FIG. 1

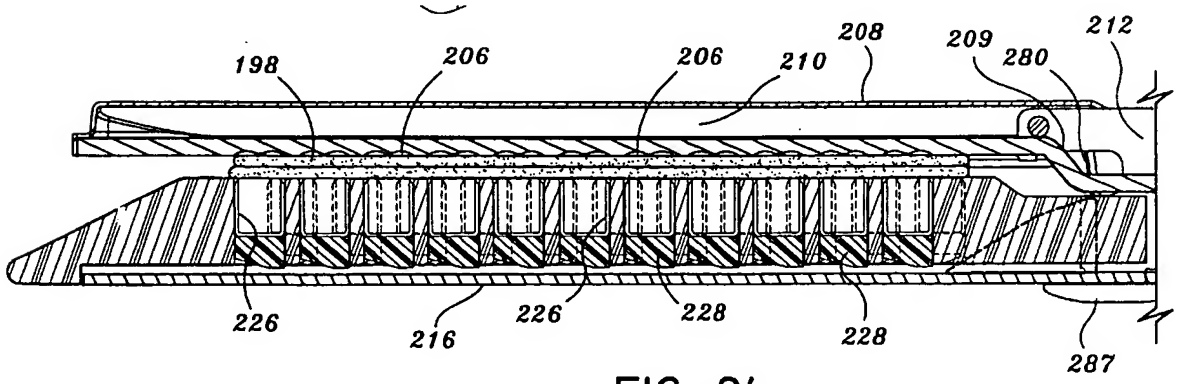
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FIG. 24

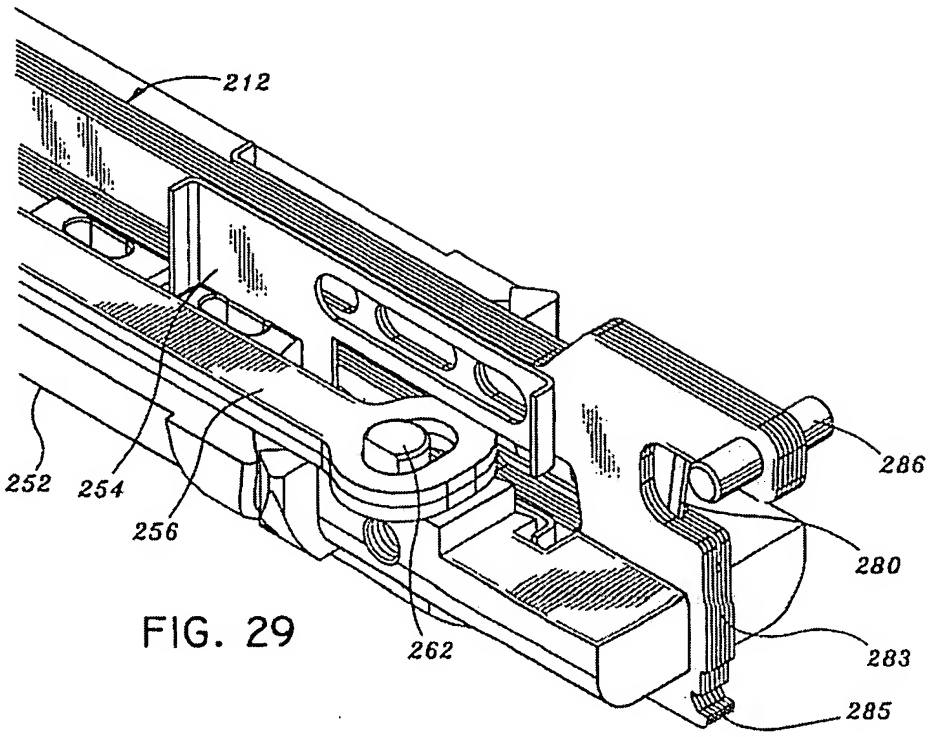

FIG. 29

Independent Claim 26 recites a tool assembly including, inter alia, "an anvil and a cartridge assembly...a clamp member positioned adjacent a proximal end of the cartridge assembly and the anvil and being movable from a first position to a second position to maintain the proximal end of the cartridge assembly and the anvil in juxtaposed alignment, and a dynamic clamping member...being movable from a first position to a second position to define a maximum tissue gap between the cartridge assembly and the anvil adjacent the dynamic clamping member during ejection of the plurality of fasteners from the cartridge assembly." Applicants respectfully submit that Claim 26 is patentable over Fontayne and Milliman, alone or in combination. More specifically, neither Fontayne nor Milliman disclose a tool assembly

which includes a clamp member configured to maintain the proximal end of the cartridge assembly and anvil in juxtaposed alignment and a dynamic clamping member configured to define a maximum tissue gap between the cartridge assembly and the anvil adjacent the dynamic clamping member during ejection of the plurality of fasteners from the cartridge assembly.

In the Office Action, the Examiner stated that Fontayne discloses a tool assembly including the following:

> "a clamp member 90 positioned adjacent a proximal end of the cartridge assembly and the anvil and being movable from a first position to a second position to maintain the proximal end of the cartridge assembly and the anvil in juxtaposed alignment, i.e., close together, and a dynamic clamping member at the proximal end of 280 movable positioned in relation to the anvil and the cartridge assembly as shown in figs. 12-14, but fails to disclose wherein the dynamic clamping member being movable from a first position to a second position to define a tissue gap between the cartridge and the anvil adjacent the dynamic clamping member during ejection of fasteners from the cartridge. Milliman shown a tool assembly comprising an anvil and cartridge assembly, and a dynamic clamping member being movable as broadly claimed as shown in figs. 49, 51-52. It would have been obvious to one having ordinary skill in the art to have provided Fontayne's tool assembly with a dynamic clamping member as taught by Milliman in order to press the anvil and cartridge assembly together so as to hold them firmly while the dynamic clamping member is moved forward along the tool assembly."

Applicants respectfully disagree with the Examiner that the modification of Fontayne in view of Milliman as proposed by the Examiner would result in the tool assembly recited in Claim 26. The drive assembly 212 of Milliman is configured to move the anvil assembly 20 to a

closed position as well as define a maximum tissue gap. If one of ordinary skill in the art were to take Milliman's drive assembly 212 including working head 268 and incorporate it into Fontayne's apparatus, one of ordinary skill would see no need for Fontayne's clamp member 90 or benefit to providing the clamp member 90. As discussed above, Fontayne's clamp member effects closure of the anvil and cartridge assemblies. Milliman's drive assembly performs this identical function. Thus, if one were to modify Fontayne's apparatus in view of Milliman's disclosure, Milliman's drive assembly 212 would replace Fontayne's closure tube 90. As such, even if the combination suggested by the Examiner were made, the resultant apparatus would still lack the combination of a clamp member and a dynamic clamping member recited in Claim 26. Further, Applicants emphasize that there is no teaching or suggestion in either Fontayne or Milliman which would suggest that any benefit would be derived from providing a tool assembly which includes structure configured to define a maximum tissue gap adjacent the dynamic clamping member and configured to maintain the proximal end of the cartridge assembly in juxtaposed alignment as stapling occurs. For these reasons, Applicant believes that Claim 26 is patentable over Fontayne and Milliman and in condition for allowance.

Claims 27, 34-39, 42, 43 and 45-47 depend from Claim 26. For at least the reasons discussed above with respect to Claim 26, inter alia, Applicants also believe that Claims 27, 34-39, 42, 43 and 45-47 are also in condition for allowance.

Claim 48 recites a tool assembly for use with a surgical stapler including, inter alia, "an anvil...a cartridge assembly...a clamp member positioned adjacent a proximal end of the tool assembly, the clamp member being movable from a retracted position to an advanced position

and being configured to maintain a proximal end of the anvil and cartridge assembly in the approximated position when the clamp member is in the advanced position, and a dynamic clamping member...including an upper flange portion engaging a surface of the anvil and a lower flange portion engaging a surface of the cartridge assembly, at least one of the upper and lower flange portions having a rounded cross-section along an axis transverse to a longitudinal axis of the cartridge assembly, the dynamic clamping member being configured to define a maximum tissue gap between the anvil and the cartridge assembly during ejection of stapler from the cartridge assembly." As discussed above with respect to Claim 26, neither Fontayne nor Milliman disclose or suggest a tool assembly including a clamp member and dynamic clamping member as recited in Claim 48. Accordingly, Applicants believe that Claim 48 patentably defines over Fontayne and Milliman, taken alone or in combination, and is in condition for allowance. For at least these same reasons, Applicants believe that Claims 49-54, which depend from Claim 48, are also in condition for allowance.

In the Office Action, Claims 28-33, 40-41 and 44 which depend from Claim 26 were rejected under 35 U.S.C. § 103(a) over Fontayne in view of Milliman and U.S. Patent No. 5,690,269 to Bolanos. Bolanos was cited by the Examiner allegedly to teach the concept of "a drive member having a coaxial drive cable...". Bolanos fails to cure the deficiencies of Claim 26 as discussed above. Thus, for at least the reasons discussed above with respect to Claim 26, Applicants believe that Claims 28-33, 40, 41 and 44 are also in condition for allowance.

In view of the foregoing amendments and remarks, it is respectfully submitted that all claims pending in this application, namely claims 26-54, are in condition for allowance. Accordingly, early and favorable reconsideration of this application is respectfully requested. Should the Examiner feel that a telephone or personal interview may facilitate resolution of any remaining matters, she is respectfully requested to contact Applicant's attorney at the number indicated below.

Respectfully submitted,

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